

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2213

To be argued by
DANIEL J. BELLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2213

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK ATKINS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,

*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DANIEL J. BELLER,

LAWRENCE S. FELD,

*Assistant United States Attorneys,
Of Counsel.*

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	5
ARGUMENT:	
POINT I—The Court properly admitted evidence of the defendant's recent escape from custody on the question of motive	7
CONCLUSION	11

TABLE OF CASES

<i>Andrews v. United States</i> , 309 F.2d 127 (5th Cir. 1962), <i>cert. denied</i> , 372 U.S. 946 (1963)	9
<i>Loux v. United States</i> , 389 F.2d 911 (9th Cir.), <i>cert. denied</i> , 393 U.S. 867 (1968)	8
<i>Moore v. United States</i> , 150 U.S. 57 (1893)	8
<i>United States v. Abshire</i> , 471 F.2d 116 (5th Cir. 1972)	9
<i>United States v. Caci</i> , 401 F.2d 664 (2d Cir. 1968), <i>cert. denied</i> , 394 U.S. 917 (1969)	9
<i>United States v. Johnson</i> , 254 F.2d 175 (2d Cir.), <i>appeal dismissed</i> , 357 U.S. 933 (1958)	8
<i>United States v. Murphy</i> , 374 F.2d 651 (2d Cir.), <i>cert. denied</i> , 389 U.S. 836 (1967)	8
<i>United States v. Polansky</i> , 418 F.2d 444 (2d Cir. 1969)	9
<i>United States v. Rosenberg</i> , 195 F.2d 583 (2d Cir.), <i>cert. denied</i> , 344 U.S. 838 (1952)	8
<i>United States v. Stubblefield</i> , 408 F.2d 309 (6th Cir. 1969)	8

OTHER AUTHORITIES

2 Wigmore, Evidence § 392 (3d Ed. 1940)	9
---	---

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2213

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK ATKINS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frank Atkins appeals from a judgment of conviction entered on September 4, 1974, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 74 Cr. 663 was filed in three counts on July 3, 1974. Count One charged Kenneth and Frank Atkins with uttering a forged United States Treasury Check in violation of Title 18, United States Code, Sections 495 and 2. Count Two charged both defendants with possession of a letter stolen from the mails in violation of Title 18, United States Code, Sections 1708 and 2. Count Three charged Frank Atkins alone with possession of a .38 caliber pen gun which was not registered to him in the National Firearms Registration and Transfer Record in violation of Title 26, United States Code, Section 5861(d), and

which was not identified by a serial number in violation of Title 26, United States Code, Section 5861(i).

The trial of Frank Atkins commenced on August 5, 1974,* and concluded on August 7, 1974, when the jury returned a verdict of guilty on Counts One and Three and not guilty on Count Two. On September 4, 1974, Frank Atkins was sentenced to concurrent one-year terms of imprisonment on Counts One and Three. He is presently serving his sentence.**

Statement of Facts

The Government's Case

The Government's proof at trial, consisting of the testimony of Howard Stein, the owner of a check cashing store, Robert Smith, the payee of the forged check, his wife, of Postal Inspector Ed Jones, and of admissions of the appellant, clearly established Frank Atkins' guilt of the crimes for which he was convicted.

The evidence at trial disclosed that at 8:45 a.m. on June 25, 1974, appellant's brother, Kenneth Atkins, entered Rite's Check Cashing, Incorporated, 275 West 145th Street, Manhattan, and presented for payment a \$1,221.81 United States Treasury check (GX 1), payable to Robert Smith, to the proprietor of the check cashing concern, Howard

* Prior to trial, Atkins moved to suppress admissions made by him to Postal Inspectors and a .38 caliber pen gun found in the pocket of his raincoat. After a hearing held on August 5, 1974, the motion was denied.

** On August 2, 1974, Kenneth Atkins entered a plea of guilty to Count One of the indictment. On September 4, 1974, he was sentenced to a term of imprisonment of six months.

Stein (Tr. 12).^{*} Kenneth furnished two pieces of identification, a Community College identification card (GX 3) and a Human Resources Administration enrollee identification card (GX 2), and when asked by Stein to sign the check he did so in the name of Robert Smith (Tr. 14).^{**} Stein, who had been in the check-cashing business for twenty-four years, became suspicious. He noticed that one of the pieces of identification had been erased and altered. Moreover, the check was addressed to a location in the Bronx although his establishment was in Manhattan. Finally, the check had been issued thirteen days earlier. Accordingly, Stein telephoned an office of the United States Postal Inspection Service (Tr. 16-17).

Postal Inspector Ed Jones, one of the four agents who responded to Stein's call, testified that when he arrived at Rite's Check Cashing Incorporated he approached Kenneth Atkins and asked his name. Kenneth replied that his name was "Robert Smith" (Tr.48). Kenneth also sup-

^{*} "Tr." refers to the trial transcript; "GX" to government exhibits in evidence; "Br." to appellant's brief.

^{**} Robert Smith, the manager of a clothing store in Manhattan, testified that he received checks from the Veterans Administration for educational benefits under the G.I. bill, that he was expecting one in June, that the check which Kenneth Atkins attempted to cash was the one he expected but never received (Tr. 28-29). He stated that he never authorized either Frank or Kenneth Atkins to cash or sign the check for him, and that the signature in the name Robert Smith on the check was not his (Tr. 29-30). Mrs. Robert Smith testified that on June 14, 1974, two days after the check had been issued, she left her apartment at approximately 12:30 P.M. to take one of her children to a Head Start day care center. On her way out she opened her mailbox, found a letter and tore the cellophane window to see what was inside. She saw it was the V.A. check she and her husband were expecting. Since Mrs. Smith did not have her purse with her at the time, she replaced the check in the mailbox and locked it. When she returned home at 3:30 P.M. the check was missing (Tr. 36).

Kenneth and Frank Atkins lived with their parents at 820 Thieriot Avenue, in the same Bronx building as Mr. and Mrs. Robert Smith (Tr. 30-31).

plied a Social Security number which corresponded to the number on the check. When asked about the Community College identification card, however, Kenneth was unable to state the school's location (Tr. 49-50). At that point, Frank Atkins entered the check cashing store and said, "What's happening?" When asked his name he replied that his name was "Smith" and that the other man was his brother (Tr. 50). Frank and Kenneth then agreed to accompany the Postal Inspectors to the Bronx General Post Office (Tr. 51).

At the Post Office, Frank Atkins was advised of his rights. He said that he understood his rights and signed a warning and waiver form (Tr. 52-53). He then stated that his brother took the check, showed it to Frank and that together they tried to cash the check on several occasions (Tr. 52). Frank stated that they had been unsuccessful because of the large amount of the check. They learned, however, of a restaurant owner who would cash the check for a \$400 fee. It was while the two brothers were waiting for the restaurant owner to arrive that they went to Stein's check cashing store. Frank also said that he and his brother intended to divide the proceeds of the check (Tr. 52).*

Finally, when asked if he had any weapons, Frank produced a .38 caliber pen gun from his raincoat with a live .38 caliber bullet in the chamber.** He claimed that the gun belonged to Kenneth (Tr. 54-55).

* On cross-examination, Inspector Jones testified that Kenneth Atkins admitted at the Post Office that he had taken the check and that he and his brother had attempted to cash it (Tr. 65).

** Jones also testified that the pen gun was operable. John Pitta, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, testified that the gun had no serial number, that it was not registered as required by law, and that it was operable (Tr. 72-77).

The Defense Case

Kenneth Atkins testified in his brother's behalf. He admitted that he had been convicted of armed robbery in December, 1973, while in the Marine Corps, and that he had been sentenced to three years' incarceration (Tr. 96-97). He stated that he escaped from the Marine brig at Camp LeJeune, North Carolina, in December, 1973, and returned to New York (Tr. 97). In an attempt to exculpate his brother, he testified that he took the check from the top of the mailbox area of 820 Thieriot Avenue, and that he had tried to cash it on three prior occasions (Tr. 100-10). He admitted forging Robert Smith's name on the check and attempting to cash the check on June 25. He denied talking to Frank about the check on June 25 and testified that Frank was not with him on any of the other occasions when he had attempted to cash the check (Tr. 101). Kenneth also testified that the pen gun belonged to him and that the raincoat in which it was found also belonged to him (Tr. 97-98).*

On cross-examination, Kenneth stated that he had returned to New York in December, 1973 and had no employment. He stated that he was supported by his parents (Tr. 105-106). He also testified that he intended to give Frank half the proceeds of the check (Tr. 114). He maintained that he did not tell Frank about the check because he feared a conspiracy charge (Tr. 115). Finally, Kenneth testified that at the time he cashed the check he and his family needed money (Tr. 115).

Frank Atkins testified on his own behalf and denied any involvement with the check. He stated that he had arranged to meet a friend at nine o'clock in the morning on

* On cross-examination, Kenneth testified that he was six feet tall and wore a medium-size coat. The raincoat in question was a size 36 short (Tr. 123).

June 25 and that he had gone to keep this appointment with his brother. Frank went into a store and was unable to find Kenneth when he returned to the street (Tr. 127). He then saw four men enter the check cashing concern and followed them out of curiosity (Tr. 128). Observing his brother inside, he went into the check cashing store and asked what was happening. He said his name was Frank Atkins and that the other man was his brother. He was arrested, handcuffed, and brought to the Post Office. He gave incriminating statements at the Post Office only after he was told his brother was facing fifteen years imprisonment (Tr. 129). He testified that the gun was in Kenneth's raincoat and that he did not know the gun was in the coat until he arrived at the Post Office holding the raincoat and felt something hit his knee.

On cross-examination, Frank Atkins stated that he was not employed and that prior to his arrest he was unable to find work. When asked why he had difficulty finding work he indicated that asthma and an allergy prevented him from taking many jobs (Tr. 133-134). Appellant was then briefly questioned about his escape from a North Carolina prison in May, 1974, and about his return to New York. When asked whether his escape was not the real reason he was unemployed, and that jobs were unavailable to him, Frank said it was not (Tr. 136).

On redirect, Frank stated that he left the prison and came to New York to try and persuade his brother to return to Camp LeJuene. He said he was unsuccessful in doing so.

James Atkins, appellant's father, testified that he notified the authorities in North Carolina of Frank's arrival in New York.

ARGUMENT

POINT I

The Court properly admitted evidence of the defendant's recent escape from custody on the question of motive.

The district judge permitted the Government to cross-examine Frank Atkins with respect to employment prior to his arrest. Frank stated that he was unable to find work prior to his arrest. He explained that he was unable to take certain jobs because of asthma and a skin allergy. When asked if there were any other reasons he was unable to gain employment, the defendant again gave asthma and his allergy as the reasons. Frank was then asked the following series of questions:

Q. How long have you been in New York? A. All my life.

Q. Were you in New York in May of 1974? A. Yes.

Q. Were you in New York in April of 1974? A. No.

Q. Where were you in April? A. I was in Gatesville County Prison.

Q. In custody? A. Yes.

Q. How long were you in custody?

* * * * *

A. About nine or ten months.

* * * * *

Q. Isn't it a fact you escaped from custody in North Carolina? A. Yes.

Q. Isn't that the reason you are unemployed? A. No.

Q. Isn't that the reason that any jobs with any substance were unavailable to you? A. No (Tr. 134-136).

The Government argued that the defendant's escape from custody in May, 1974, less than one month before the commission of the crime charged in Count I, was directly related to Atkins' motive to commit that crime. It was the Government's theory, argued both to the Court outside the presence of the jury (Tr. 87-89), and to the jury in summation (Tr. 184-186), that if Frank had sought legitimate employment, for which he would have had to give his social security number, his escape would ultimately have been brought to the attention of the authorities. The Government argued, accordingly, that the defendant's impecunious position led him to commit the crime. The trial judge permitted the Government to question appellant with respect to the escape on that basis, ruling that the recent escape "goes right to the guts of the matter" (Tr. 88).

The decision allowing this line of cross-examination was entirely correct. It is well settled that the Government may prove motive as circumstantial evidence that an offense was committed even when such proof might incidentally show the commission of another offense. *United States v. Murphy*, 374 F.2d 651, 654 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967); *United States v. Johnson*, 254 F.2d 175, 176 (2d Cir.), *appeal dismissed*, 357 U.S. 933 (1958). The trial judge has broad discretion in admitting evidence tending to show a motive for the crime charged. *Moore v. United States*, 150 U.S. 57, 60-61 (1893); *United States v. Rosenberg*, 195 F.2d 583, 596 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

Proof of an escape from prison, when it tends to establish a motive to commit the offense charged, has been held admissible, even though the evidence of the escape may also show the defendant's general criminal disposition. *Loux v. United States*, 389 F.2d 911, 918-19 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States v. Stubblefield*, 408 F.2d 309, 310 (6th Cir. 1969). As the Court of

Appeals held in *United States v. Abshire*, 471 F.2d 116, 118 (5th Cir. 1972): "The inclusion of references to 'jail' or 'prison' does not disqualify essential, otherwise relevant, testimony." See also *Andrews v. United States*, 309 F.2d 127, 128-29 (5th Cir. 1962), *cert. denied*, 372 U.S. 946 (1963).

The evidence of appellant's escape here was directly probative of his motive to commit the crime of uttering a forged Treasury check charged in the indictment. The defendant escaped from custody in May, 1974, and the check was stolen on June 14, 1974—a period when he did not have regular, gainful employment.* Under the well established principle that evidence of circumstances indicating lack of funds or lack of access to funds is admissible to establish motive to commit a pecuniary offense, 2 Wigmore, EVIDENCE § 392 (3d Ed. 1940); *United States v. Polansky*, 418 F.2d 444, 448 (2d Cir. 1969); *United States v. Caci*, 401 F.2d 664, 670 (2d Cir. 1968), *cert. denied* 394 U.S. 917 (1969), the evidence of the escape was properly admitted as proof of the true reason why Atkins had been prevented from obtaining regular employment, and thus served to establish his motive to commit the crime charged.

At no time did the Government seek to use the fact of Frank Atkins' escape from custody as a means of showing the defendant's bad character or of impeaching the defendant's credibility. When the fact of the defendant's escape was made known to the jury, Government counsel im-

* On cross-examination, Frank Atkins testified that he made approximately \$50 a week running parties on week-ends with a cousin (Tr. 136). The jury was not required to believe this testimony, particularly in light of Kenneth Atkins' testimony that in June, 1974, he and his "family" needed money (Tr. 115). In any event, the jury could have found that \$50 per week was not substantial income and that with other employment barred to him, Frank Atkins had a strong motive to commit the crime.

mediately followed with a question asking whether the escape was not the real reason the defendant was unemployed.*

In summation** government counsel emphasized the motive both brothers had to commit the crime. The prosecutor first stressed that Kenneth had escaped from the Marine brig at Camp LeJuene and that "he supported himself by taking money from his parents and that is what most 21-year-old people do *particularly if they are out of work and can't get a job if they are escapees from a military brig. It is pretty tough to get a job where you have to give a number*" (Tr. 184).

Then the prosecutor said "What about Frank Atkins? He was in the same boat" (Tr. 185). After attempting to refute defense arguments that Frank had been up for parole and that his sole reason for coming to New York was to convince his brother to return to Camp LeJuene, the Assistant United States Attorney remarked:

"What did he do in New York, in Fun City, this escapee from an institution, from a custodial facility *with no money?* He stole a check." (Tr. 185-186; emphasis added).

* Frank Atkins sought to persuade the jury that his lack of employment was temporary, a condition that would last only until he found a job that did not exacerbate his asthmatic or allergic condition. Appellant testified as follows:

"I wasn't able to find none [jobs] *right off hand* because *some* jobs I can't take because of my asthma and my rash (Tr. 133).

Accordingly, the Government sought to show that the lack of income would be a permanent condition, as long as Frank was an escapee, and that his motive to commit an offense involving \$1,200 was therefore substantial.

** The relevant portion of the Assistant United States Attorney's summation (Tr. 184-186) is quoted in Appellant's Brief, at 7-8.

The character of the defendant was not brought into question by this line of argument * which was properly allowed on the question of motive and was limited to that purpose.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DANIEL J. BELLER,
LAWRENCE S. FELD,
*Assistant United States Attorneys,
Of Counsel.*

* Appellant argues that he was prejudiced by a remark of the prosecution in summation indicating that Kenneth Atkins had acted in concert with someone in committing the armed robbery for which he was court martialed which was allegedly designed to suggest to the jury that Kenneth's partner in that robbery was Frank. The claim is preposterous. On cross-examination, Kenneth stated that he had committed the robbery with another person (Tr. 105), and in summation the prosecutor commented upon that testimony (Tr. 181). The point was not, of course, that Frank had helped Kenneth in the armed robbery—Frank stated that he had been in jail nine or ten months by the time he escaped (Tr. 135), making it impossible for him to have helped Kenneth commit a crime in December, 1973—but that Kenneth was not the kind of person who acted alone.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Daniel Beller being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the *18* day of *November*
he served a copy of the within *brief*
by placing the same in a properly postpaid franked
envelope addressed:

*The Legal Aid Society
United States Courthouse
Foley Square
New York, N.Y. 10007*

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing *at* the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Daniel Beller

Sworn to before me this

18th day of *November*, *1974*

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 19 *76*

ONLY COPY AVAILABLE